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ADMINISTRATIVE TRIBUNAL OF THE ORGANIZATION OF AMERICAN STATES

DAVID J. PADILLA***

I. INTRODUCTION — THE SETTING AND PARTICIPANTS

The Organization of American States (OAS) is a regional international organization. It was created with the deposit of the tenth instrument of ratification of its Charter by Colombia on December 13, 1951.¹ Its purpose was to achieve peace and justice, to promote solidarity among its members, to strengthen their cooperation, and to defend their respective sovereignties, territories and independence.²

Historically, the OAS is the direct descendant of the International Union of American Republics which was formed in Washington, D.C. in 1890 to collect and distribute information relating to commercial matters of common interest to the Western Hemisphere nations. Accordingly, it is the world's oldest organization of its kind. The Pan American Union (PAU) became known as the General Secretariat (Secretariat) of the OAS with the amendment of the Charter of Bogotá by the Protocol of Buenos Aires in 1967.³

While the OAS has a General Assembly, councils, committees, and various specialized conferences and organizations in keeping with its modern and broadened role, its central and permanent organ is the Secretariat.⁴ The OAS is now more than simply a mutual

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1. Charter of the Organization of American States, April 30, 1948 [hereinafter cited as OAS CHARTER]. The OAS CHARTER was signed at the Ninth International Conference of American States held at Bogotá, Colombia, OEA/SER.A/7/Rev. 2 (Original: Spanish).

2. *Id.*, pt. I, ch. I, arts. 1, 2.

3. Protocol of Buenos Aires, signed at the Third Special Inter-American Conference, Feb. 15-27, 1967, OEA/SER. X/4/Rev. 1.

4. OAS CHARTER, *supra* note 1, at ch. XIX, art. 113.

defense alliance.

A Secretary General who directs the Secretariat, is elected every five years by the General Assembly. The Secretariat, headquartered in Washington, D.C., consists of approximately 1500 career servants. These career servants form a multinational group of professional, technical, and clerical staff drawn from the various OAS member states. Under the direction of the Secretary General, this staff is charged with implementing the programs and decisions of the General Assembly and its subordinate policy-making organs.⁵ Although most of the staff works at the Washington headquarters, over two hundred employees live work in the different member states.

International organizations have been created by multilateral conventions whose member governments cooperate to achieve common ends. Since World War II, there has been a great proliferation of such organizations as the nations of the world confront increasingly complex and specialized problems which defy domestic solutions.

In this century, international organizations have realized that in order to yield desired results, they must enjoy a high degree of independence from any single member state or group of member states. To that end, the constitutive treaties of international organizations invariably address the question of privileges and immunities of the organization and its agents.⁶ As a result, international organizations have achieved juridical personalities similar to that of private corporations.⁷ Unlike corporations, however, international organizations, with certain exceptions, are not subject to the national law of any one state or group of states.⁸

The Charter of the OAS, as amended by the Protocol of Buenos Aires, is the constitutive instrument in which its American framers sought to embody the organization's values. The functions

5. *Id.* at arts. 117, 118.

6. *E.g.*, U.N. CHARTER art. 105, 16 U.S.T. 1134; OAS CHARTER, *supra* note 1, at ch. XXIII, arts. 139-41.

7. U.N. CHARTER art. 104; OAS CHARTER, *supra* note 1, at ch. XXII, art. 139.

8. U.N. Agreement on Principles and Immunities, 1946, 1 U.N.T.S. 16-33, 90 U.N.T.S. 329 (errata). To further insulate international organizations and their servants from undue influence, and to enhance the prospects for their success, a unique international legal regime has come into existence. It regulates the organizations' activities, defines their powers, and ensures, insofar as possible, their effectiveness. This legal regime is the most effective way to benefit the community of nations encompassed by the organization, while giving the organization sufficient autonomy to best guarantee its international character.

of each OAS organ are defined in general terms in the Charter. The specific rules and procedures of the various organs are included in hierarchically inferior instruments designed to spell out the intent of the Charter's authors.

The Secretariat's instrument is known as the "General Standards to Govern the Operations of the General Secretariat of the Organization of American States" (General Standards).⁹ Article 15 of the General Standards illustrates the desire of the member states to allow the Secretariat autonomy in its operations:

In the performance of their duties, the Secretary General and the Assistant Secretary General shall not seek or receive instructions from any government or any authority outside the Organization and shall refrain from any action that may be incompatible with their position as international officers responsible only to the Organization.¹⁰

In order to maintain the autonomy of the OAS, international career servants are prohibited from accepting employment with any government or nomination to public office, or from seeking the political influence or support from any government.¹¹ They are free, however, to exercise their political rights to vote and support the party or candidates of their choice in their respective countries.¹² In order to establish concrete personnel policies for the Secretariat, the Secretary General has published a set of Staff Rules.¹³ These rules set forth legally binding rights and duties

9. General Standards to Govern the Operations of the General Secretariat of the OAS Approved by the General Assembly by AG/RES 123 (III-0/73) and amended through AG/RES. 248, 249, 256 and 257 (VI-0/76) and AG/RES 301 (VII-0/77), OEA/SER.D/I.1.2/Rev.2 (1977). (Original: Spanish) [hereinafter cited as General Standards].

The General Standards were proposed by the Permanent Council in accordance with Charter Article 91b, and were adopted by the General Assembly of the OAS on April 14, 1973. Charter Article 91b provides that the General Assembly shall:

watch over the observance of the standards governing the operation of the General Secretariat and, when the General Assembly is not in session, adopt provisions of a regulatory nature that enable the General Secretariat to carry out its administrative functions.

OAS CHARTER, *supra* note 1, at ch. XIV, art. 91.

10. General Standards, *supra* note 9, at art. 15.

The same point is made in articles 18, 21, and 25 regarding the international career servants. *Id.* at arts. 18, 21, 25. In addition, the Secretary General and his staff are expected to refrain from any conduct which might be detrimental to a particular member state. *Id.* at art. 23.

11. *Id.* at arts. 26, 29. See also Organization of American States Staff Rules 101, OEA/SER.D11.6/Rev.1 (Original: Spanish) [hereinafter cited as OAS Staff Rules].

12. *Id.*

13. *Id.* The OAS Staff Rules were created as a result of the Secretary General's publica-

which govern the professional activities, and in some measure, the private lives of the Secretariat's staff. The interpretation and application of the OAS Charter, the General Standards, and the Staff Rules will form, to a great extent, the subject of this study.

In spite of the OAS' need for autonomy from national governments it has not gone unchallenged, particularly as it pertains to the international civil servant. To some degree a natural tension exists between the principle of autonomy of international organizations and the inherent tendency on the part of nation-states to place their self-interests above the organization's philosophy. Additionally, it is not surprising that individual staff members have at times sought to test the limits of these principles. Moreover, within the Organization and its constituent bodies, relationships which create frictions constantly evolve. This is not necessarily a weakness of the Organization, but rather an inevitable and, for the most part, a positive reflection of the dynamic character of human beings and their institutions. The following discussion will focus generally upon the administrative labor law of international organizations, and particularly upon the Administrative Tribunal of the OAS.¹⁴

II. ADMINISTRATIVE TRIBUNALS OF INTERNATIONAL ORGANIZATIONS

A. *Introduction*

The international career servant is a key participant in international organizations. Theoretically, his motivation goes beyond parochial nationalism and aims for the common welfare of the nations whose governments created the international organization.¹⁵

tion of Executive Order No. 74-3 of December 20, 1974. The latest version of the Staff Rules dates from January 1, 1975.

14. The author intends to present this study in a scientific and theoretical manner for the sake of both clarity and intelligent analysis. The value of this investigation depends upon a consistent examination of the subject within a broad framework. For this purpose, the methodology of two important theorists in this field, Harold D. Lasswell and Myres S. McDougal, has been employed. In these theorists' perception of the World Public Order System, participants who interact dynamically in a given political, social, and economic arena are motivated by particular values. This is known as the Community Value Process. For a conceptualization of value analysis, see M. McDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER*, ch. 1 (1960) [hereinafter cited as McDUGAL & ASSOCIATES]; H. LASSWELL & A. KAPLAN, *POWER & SOCIETY*, ch. IV (1950). See also McDougal, *Some Basic Theoretical Concepts About International Law, A Policy Oriented Framework of Inquiry*, 4 J. CONFLICT RESOLUTION 346 (1960).

15. As commented upon by Jencks, *Due Process of International Organizations*, 19 INT'L ORG. 2 (1965).

The international career servant is in a peculiar position since he often must leave his native country, uproot his family, temporarily sever his business, professional, and cultural connections, and cast his lot with an untried institution.

Because the international career servant owes allegiance to his particular international organization, he is deliberately insulated from external pressures.¹⁶ This necessary and desirable insulation, however, brings with it certain consequences, the most important of which is security.

Since the treatment and conduct of the international employee are not generally subject to the law of any given state, the international staff member is rendered quite vulnerable. He cannot, like his national counterpart, readily appeal to public opinion for support. Nor does he have access to his congress or parliament. The staff associations of international organizations generally have little legal power to redress administrative actions which affect international career servants either individually or collectively. Additionally, the difficulties commonly encountered by experienced international employees in finding new employment enhance their vulnerability.¹⁷ Virtually all international organizations provide for some type of internal grievance and disciplinary procedure which a staff member may use to obtain redress in case of arbitrary treatment.¹⁸

B. Remedies—OAS

In the General Secretariat of the OAS redress takes two forms. First, a staff member may request a hearing by the Secretary General when an administrative measure affecting the employee's interests is involved.¹⁹ This request stays the administrative measure in question until the Secretary General has duly responded within the period prescribed in the Staff Rules.²⁰

The hearing, known as an *Audiencia*, is somewhat misleading. It generally consists of a simple interchange of written communica-

16. General Standards, *supra* note 9, at art. 28; OAS Staff Rules, *supra* note 11, at 101.7.

17. M.B. AKEHURST, *THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS*, ch. 1 (1967).

18. General Standards, *supra* note 9, at arts. 50, 57-63; OAS Staff Rules, *supra* note 11, at 111-12.

19. *Id.* OAS Staff Rules at 112.1.

20. *Id.*

tions between the staff member and the Secretary General. In practice, however, the Secretary General almost always ratifies the Administration's decision since this step in the grievance procedure does not include fact-finding. Moreover, it must be accomplished within a relatively short period of time.²¹ The utility of this procedural step is somewhat questionable given these practical limitations.

Second, assuming that the Secretary General renders a response contrary to the staff member's interests at *Audiencia*, the career servant then may request that a Joint Advisory Committee on Reconsideration (JACR) be convoked to examine the claim more closely.²² This is known as Reconsideration. The employee must make this request within 15 days of notification of the Secretary General's response at *Audiencia*.²³

The JACR has broad investigative powers. Its responsibilities which require it to hear the claimant, who may either represent himself or designate another staff member for this purpose.²⁴ In addition, the Secretary General may be represented by any staff member the Secretary shall so designate.²⁵ The Department of Legal Affairs of the Secretariat usually performs this function.

While the procedure is normally limited to written statements and oral comments thereon by the parties, the JACR may also obtain from any staff members the evidence that it deems appropriate for its investigation.²⁶ This quasi-subpoena power also extends to relevant documentary material kept in the Secretariat. The initiation of the Reconsideration process, unlike the *Audiencia*, does not suspend the implementation of the decision under challenge.²⁷

21. *Id.* at 112.1(a), (b), (c).

22. *Id.* at 112.2.

23. The JACR is composed of three persons representing, respectively, the Secretary General, the Staff Committee, and a chairman selected in each case by agreement of the two other members. OAS Staff Rules, *supra* note 11, at 112.4.

24. *Id.* at 112.5(c).

25. *Id.* at 112.5(c), para. 2.

26. *Id.* at 112.5(f).

27. *Id.* at 112.5(d).

The Staff Rules also provide for disqualification of committee members, *id.* at 112.4(b), (d), (e); conciliatory functions, *id.* at 112.5(g); and majority rule with the right to present a written dissent, *id.* at 112.5(h).

Except in cases involving the unsatisfactory performance of services, the JACR may review both the substantive and procedural aspects of an administrative measure. However, where work performance is at issue, the Administration's performance evaluation of an employee may only be examined insofar as the facts may show that the decision was motivated by prejudice or some other irrelevant factor. *Id.* at 112.3(b).

In cases of alleged infractions of Secretariat rules by staff members, a special review body, called the Joint Disciplinary Committee, is provided for in the Staff Rules.²⁸ This Committee is similar to the JACR in that it too has an essentially advisory function.²⁹

It differs, however, in that it is convoked by the Secretary General before imposing disciplinary measures that are more severe than an oral admonition.³⁰ Moreover, the harsher measures such as written admonition, written censure, suspension, and dismissal, may not be imposed before the Joint Disciplinary Committee has made recommendations based upon its findings.³¹

This principle is subject to the single important exception that, in cases of summary dismissal warranted by clear evidence of serious misconduct, immediate enforcement may be imposed.³² Even here, however, a summary hearing is required and the decision may be appealed to the JACR. However, the appeal does not bar application of the summary dismissal order.³³

The internal legal mechanisms used in the General Secretariat typify internal procedures employed by international organizations both to air members' grievances and to enforce disciplinary measures. Due process safeguards compensate for the peculiar vulnerability of the international career servant. Exhaustion of internal remedies is generally a *sine qua non* for appeal to international administrative tribunals. Except where parties to a labor dispute waive their exhaustion of internal remedies by written mutual consent, the failure to exhaust internal remedies will bar appeal to the administrative tribunals.³⁴

28. *Id.* at 111.2.

29. *Id.* at 111.2(a).

30. *Id.* at 111.3(a).

31. *Id.* at 111.1(c), (d).

32. *Id.* at 110.5, 111.1(d). Examples of causes for summary dismissal include but are not limited to: abandonment of post, deliberate false statements of a serious nature related to his employment, or a repetition of the commission or omission of acts that have already given rise to disciplinary measures.

33. *Id.* at 111.1(d), (i).

Any adverse decision made by the Secretary General in a disciplinary action, after receiving advice from the Disciplinary Committee, may be appealed to the JACR as of right. *Id.* at 112.2. Thus, in disciplinary cases, there is a second level of internal review that is available. Each committee may conduct what is effectively a *de novo* administrative trial of law and fact. *Id.* at 112.

34. See, e.g., Statute of U.N. Administrative Tribunal, art. 7 (1949); 3 Y.B. U.N. 922 (1948-49). See also Statute of the ILO Administrative Tribunal, art. VII (October 9, 1946) [hereinafter cited as ILOAT], reprinted in A.H. SCHECHTER, INTERPRETATION OF AMBIGUOUS

C. *Administrative Tribunals of International Organizations*

The internal legal structures of international organizations commonly provide for in-house processes like those described above. Not all international organizations though, have gone so far as to establish an independent professional judicial body, generally called an administrative tribunal. A substantial number have, however, created their own tribunals or else have adhered to the statutes of other such tribunals, thereby subjecting themselves to the jurisdiction of these specialized labor courts.³⁵

1. The League of Nations' Administrative Tribunal

The first modern international secretariat was that of the International Institute of Agriculture, founded in 1905.³⁶ The creation of its permanent staff served as the model for the Secretariat of the League of Nations and those of other international organizations.

The maintenance of a full-time multinational secretariat assigned to various duty stations throughout the world necessitated equal treatment of staff members in terms of rules of conduct, remuneration, and benefits. Thus, there was a need both for independence from the differing municipal laws of the various countries, and for a consistent and fair internal legal structure to govern the rights and duties of international career servants.

Although founded in 1920, the League of Nations did not create its prototypical Administrative Tribunal until 1927.³⁷

The League Charter provided for a career servant's right of direct appeal to the League Council. However, this procedure had proven both cumbersome and unsuccessful because the League Council was eminently political and, thus, not suited to judicial

DOCUMENTS BY INTERNATIONAL ADMINISTRATIVE TRIBUNALS (1964).

35. There are several exceptions, including the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), the International Satellite Organization, and the Inter-American Development Bank (IDB).

36. The International Institute of Agriculture (IIA) was the forerunner of the Food and Agricultural Organization of the United Nations' family of specialized agencies. AKEHURST, *supra* note 17, at 4.

37. The creation of the League's tribunal was a consequence of a controversy known as the *Monod* case. In that instance, an *ad hoc* Commission of Jurists was selected by the League Council to examine Monod's claim. AKEHURST, *supra* note 17, at 13. See also Comment, *Administrative Tribunals as Adjudicators of Disputes Arising Out of Employment Contracts With International Organizations*, 54 MICH. L. REV. 533, 535 (1956).

functions.³⁸ Furthermore, it was quickly apparent from the *Monod* case that dealing with labor disputes on an *ad hoc* basis did not provide a lasting solution to the problem, because it was unclear when such committees should be convoked and what their authority would be *vis a vis* the League's other organs.

Therefore, in 1929, the League Council formed a small, specialized labor court on an experimental basis. This court, the Administrative Tribunal, was to hear labor cases arising in the Secretariat, and also disputes concerning the Secretariat's pension program.³⁹ In addition, the Administrative Tribunal's jurisdiction was extended to similar controversies in the International Labour Office, the forerunner of the International Labour Organization.⁴⁰ In 1931, the League Assembly voted to afford this small, efficient body permanent status in the League's legal system.⁴¹ When the League of Nations was officially abolished in 1946, the newly constituted International Labour Organization (ILO), a specialized agency of the United Nations, inherited the Administrative Tribunal of the League of Nations.

In eighteen years, the League's Administrative Tribunal has decided thirty-seven cases. One commentator stated that the Tribunal

made a significant contribution to the development both of the international career service and of international administrative tribunals. It was the first, and on the whole, successful experiment in legal protection of the rights of the international civil servant. As such it was to serve as a model for future international administrative tribunals.⁴²

2. The Administrative Tribunal of the United Nations

After World War II, various national planners of the United Nations (UN) urged the creation of an administrative tribunal similar to that of the League to adjudicate labor disputes arising in the Secretariat. However, some UN members who either because they were unfamiliar with such an international judicial body, or

38. Covenant of the League of Nations, reprinted in F.O. WILCOX, *THE RATIFICATION OF INTERNATIONAL CONVENTIONS* 125 (1935).

39. Statute of the League of Nations' Administrative Tribunal (September 26, 1927), reprinted in I M.O. HUDSON, *INTERNATIONAL LEGISLATION* (1931).

40. AKEHURST, *supra* note 17, at 13.

41. LEAGUE OF NATIONS O.J., Spec. Supp. 93, 152 (1931).

42. B.C. KOH, *THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL* 30-31 (1966).

because they favored a strong and unfettered Secretary General, postponed the creation of the UN's Administrative Tribunal until 1949. Interestingly, both the United States and the Soviet Union were among those countries initially opposed to the Tribunal's creation.⁴³ Today, the UN Tribunal's jurisdiction covers both staff members of the UN General Secretariat and the staff members of other specialized international organizations in the UN system.⁴⁴ This jurisdiction extends also to disputes including the pension plans of the different organizations.⁴⁵

Amid the anti-communist hysteria of the early 1950's, the UN's Administrative Tribunal was severely tested by United States' allegations that the Secretariat harbored US citizens and others engaged in subversive activities. The General Assembly challenged the binding nature of the Tribunal's decisions when the Tribunal firmly defended its staff members' rights. Taking advantage of a provision in the Tribunal's Statute,⁴⁶ the General Assembly submitted the following questions to the International Court of Justice (ICJ) for an advisory opinion regarding the Tribunal's power:

(1) [H]as the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?

(2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?⁴⁷

The World Court, by a 9 to 3 vote, answered the first question in the negative.⁴⁸ The Court's opinion reads in pertinent part:

According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties

43. In the meantime, however, the World Health Organization (WHO), a member of the UN family, adhered to the ILO Tribunal's Statute. AKEHURST, *supra* note 17, at 14-15.

44. The UN Tribunal currently has jurisdiction over the UN (including UNRWA and UNICEF), and the pension funds of ICAO, IMCO, FAO, IDAEA, ILO, UNESCO, WHO and WMO.

45. See, e.g., Statute of U.N. Administrative Tribunal, *supra* note 34, at art. 2.

46. *Id.* at art. 11.

47. 13 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 870 (1953).

48. *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. 47 (Advisory Opinion dated July 13, 1954).

Such a contract of service is concluded between the staff member concerned and the Secretary-General in his capacity as the chief administrative officer of the United Nations Organization. . . . When the Secretary-General concludes such a contract . . . he engages the legal responsibility of the Organization If he terminates the contract of service without the assent of the staff member and this action . . . is referred to the Administrative Tribunal, the parties . . . will become bound by the judgment of the Tribunal. This judgment is, according to Article 10 of the Tribunal's Statute, final and without appeal. [T]he . . . Organization becomes legally bound to carry out the judgment and to pay the compensation awarded to the staff member. It follows that the General Assembly, as an organ of the United Nations, must likewise be bound by the judgment.⁴⁹

While only an advisory opinion, the ICJ's holding went unchallenged. However, the Assembly subsequently amended the UN Tribunal's Statute to allow for ICJ review in given cases and to permit the Assembly to request that the Tribunal itself review its own decision. Nevertheless, the judicial nature and authority of the UN's Tribunal, and to some extent that of its sister tribunals, was upheld.

This World Court opinion reversed a decision made during the last days of the League of Nations. That instance involved a number of terminated staff members who alleged breach of their employment contracts. The League Tribunal held that the League Assembly could not unilaterally and retroactively violate the acquired contractual rights of the League Secretariat's employees. Thus, the League Tribunal, by authority of its Statute, awarded money damages to the plaintiffs. Since the termination of these staff members had occurred in accordance with a Resolution of the League Assembly, publication of the Tribunal's opinion precipitated a crisis.⁵⁰ The question then arose whether the supreme political-legislative organ which had created the Tribunal was thereafter bound to execute the court's decisions. Unlike the UN Tribunal cases, however, a League Assembly subcommittee found that the Tribunal's decisions were not obligatory. The Assembly, by a 16 to 9 vote with 4 abstentions, accepted the subcommittee's findings, thus rejecting the notion of the binding nature of the

49. *Id.* at 47, 53, 62.

50. *Mayras v. Secretary General of the League of Nations*, 13 ANN. DIG. 247 (Admin. Trib. of the League of Nations 1946).

League Tribunal's decisions.⁵¹

3. The ILO Tribunal

As successor to the League Tribunal, the Administrative Tribunal of the ILO, headquartered in Geneva, presently hears cases brought by ILO international career servants and the career servants of other international organizations which adhere to the ILO's Statute.⁵²

Although the UN Tribunal's Statute has been amended to provide that the Secretary General, a member state, or an interested party in a controversy before the Tribunal may appeal to the ICJ for advisory opinions, a staff member is denied this right. However, Article XII of the ILO Tribunal's Statute states that if an international organization, subject to the Tribunal's Statute, deems a Tribunal decision to be procedurally flawed in a fundamental way, the organization's governing body may request an ICJ "advisory opinion" which shall bind the parties.⁵³

In 1956, the Executive Board of UNESCO used Article XII to question the ILO Tribunal's competence. The World Court held that the Tribunal was competent to hear UNESCO cases and that the Tribunal's judgments in those matters were valid. Furthermore, the Court stated that the fact that "the Tribunal may have rightly or wrongly interpreted and applied the law for the purposes of determining the merits in no way affects its jurisdiction."⁵⁴ This ICJ opinion, further bolstered the authority of the UN's and ILO's Administrative Tribunals, and by analogy that of the other administrative tribunals.

4. The OECD Appeals Board

The Organization for Economic Cooperation and Development (OECD) is the successor to the Organization for European Economic Cooperation (OEEC), which established an Appeals Board in 1950.⁵⁵ The Appeals Board is a true administrative tribunal and

51. AKEHURST, *supra* note 17, at 16.

52. The ILO Tribunal currently has jurisdiction over the ILO, WHO, UNESCO, ITU, WMO, FAO, CERN, ICITO - GATT, IAEA, BIRPI, and UPU.

53. ILOAT Statute, *supra* note 34, at art. XII.

54. KOH, *supra* note 42, at 31 n.27, citing YOUNG, INTERNATIONAL CIVIL SERVICE 193 (1958).

55. AKEHURST, *supra* note 17, at 15.

like those of the UN and the ILO, its decisions are legally binding. Its functions are not advisory or conciliatory as in the case of the UN's internal Joint Appeals Board.⁵⁶ Unlike the UN, ILO, and OAS Tribunals, however, the oral proceedings of the Appeals Board are not public, although its opinions are available upon request.⁵⁷

5. The European Court of Justice

The European Communities are united under three basic treaties: the Treaties of Rome which created the European Economic Community (EEC) or the "European Common Market" and the European Atomic Energy Community (EURATOM), and the European Coal and Steel Community Treaty (ECSC) signed in Paris on April 18, 1951.⁵⁸ This treaty created the European Court of Justice (ECJ).⁵⁹

Both the EEC and the EURATOM Treaties expressly provide that the Court, *inter alia*, "shall have jurisdiction in any dispute between the Community and its servants within its limits and under the conditions laid down in the staff Regulations or the Conditions of Employment."⁶⁰ In the case of the ECSC, the Court's jurisdiction is based on that institution's Staff Regulations, Article 91 which provided that

all disputes between one of the Communities and one of the persons mentioned in the present Regulations, which concern the legality of an act affecting that person's legal position shall be submitted to the Court of Justice of the European Communities.⁶¹

The ECJ acts as an administrative tribunal in matters involving the interpretation of the legal rights and duties of international career servants employed by the various European Communities. The ECJ has much broader competence than the tribunals previ-

56. The Joint Appeals Board is similar to the OAS's Reconsideration Committee. U.N. Staff Rules, ST/SGB/Staff Rules/Rev. 3, ch. XI, no. 111 (1976).

57. KOH, *supra* note 42, at 33. The United States belongs to the OECD.

58. Office of Official Publications of the EEC, Luxembourg, 1973; see also E. STEIN, DOCUMENTS FOR EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 40, 1, and 206 respectively (1976) (hereinafter cited as STEIN).

59. The ECJ's powers were further defined in the Protocol to the EEC Treaty, called the Statute of the Court of Justice, STEIN, *supra* note 58, at 86.

60. See STEIN, *supra* note 58, at EEC Treaty, at art. 179, EURATOM Treaty, at art. 152.

61. European Coal and Steel Community (ECSC) Staff Regulations, at art. 91(b).

ously discussed in terms of both the interpretation and applicability of national laws in light of the Community Treaties, and its role as adjudicator of legal disputes between member states and the Communities' various institutions.

This extremely broad, and unique competence has resulted in the suggestion that the Court's function as an administrative tribunal should be limited, or even assigned to another judicial body since the Court must consider matters which are both much broader in scope and of greater consequence to the citizens of the member states. However, the ECJ continues to decide internal labor disputes arising in the Communities just as the other currently active administrative tribunals hear claims arising in their respective international organizations.⁶²

A unique feature of this *sui generis* institution is that private individuals may appeal to the Court in an action against one of the Communities, its institutions, or its agents. Thus, unlike other administrative tribunals in which the international civil servant is invariably the plaintiff, and his employer or the administrator of his pension fund is the defendant, an international civil servant before the ECJ may be a defendant on appeal in an action brought against him. This occurs in the context of a national court where the international servant's functional privileges and immunities either do not cover him, or have been waived.⁶³

Undoubtedly, the institutionalization of administrative tribunals has to some extent limited the discretionary authority generally vested in the respective administrations of international secretariats. These courts insulate the international servant from national pressures, and afford him protection against arbitrary administrative action. However, in so doing, these tribunals limited their own powers. In addition, both the executive and parliamentary branches of international organizations often have had to appropriate funds to meet the awards ordered by the various tribunals.

The UN organizations have over 12,000 staff members. The European Communities employ approximately 5,000 persons, and the OAS General Secretariat has over 1,500 employees. The crucial

62. It is interesting to note that the ECJ, unlike its counterparts in other international organizations, is permanent in nature and requires that its seven members be lawyers.

63. See STEIN, *supra* note 58. ECSC Treaty, at arts. 40, 42, EEC Treaty, at arts. 178-99, 181, 215, EURATOM Treaty, at arts. 151-53, 188.

functions of these organizations, and the generally high-technical quality of their respective multinational staffs affords a deeper understanding of the scope and importance of international courts, in spite of the fact that the numbers of employees may not appear to be very large.⁶⁴

The collective jurisprudence of the various administrative tribunals, although reflective of the disparate characters and idiosyncrasies of the different international organizations, nevertheless produces some interesting cross-pollination. Common concepts such as acquired rights, procedural due process, and exhaustion of internal remedies are embraced by the various courts. The problems which most frequently give rise to litigation are also quite similar. Complaints stem mainly from employment terminations, lack of promotions, and improper job classifications. The general debt owed by the OAS Tribunal to other tribunals shall become quite apparent in the ensuing discussion of the principles developed by the OAS Court.

III. SOURCES OF LAW IN INTERNATIONAL ORGANIZATIONS

A. *Introduction*

Part One of this study outlined the relationship among the Charter of the OAS, the General Standards, and Staff Rules. These types of laws are what Hans W. Baade and others in the field call the "internal law" of international organizations.⁶⁵ However, this is not the sole source of law for these institutions. The following is a breakdown of the various sources of law applied by international organizations utilizing the UN and OAS as specific examples.

B. *Internal Law*

1. UN Staff Regulations and Rules; OAS General Standards and Staff Rules

The UN Secretary General's Staff Rules supplement the Gen-

64. Not all international organizations have administrative tribunals. The most conspicuous instances of institutions lacking such legal machinery are the World Bank, the IMF, the IDB, and Intelsat. In administrative and disciplinary cases, however, these institutions provide for some type of hearing similar to the OAS *Reconsideration* process. Furthermore, some United States-based organizations are considering either creating their own tribunals, or adhering to the statute of an already existing tribunal.

65. Baade, *The Acquired Rights of International Public Servants*, 15 AM. J. COMP. L. 253 (1967).

eral Assembly's Staff Regulations. These Rules augment the Regulations and specify how they are to be implemented. The OAS General Standards are the equivalent of the UN Staff Regulations. As in the UN, the OAS Secretary General promulgates the Staff Rules.

2. Personnel and Management Circulars, Administrative Memoranda, and Executive Orders

UN public service law parallels that of the OAS General Secretariat. However, the OAS uses a somewhat more cumbersome system of personnel circulars, administrative memoranda, executive orders, and management circulars to explain and detail its General Standards and Staff Rules. These papers constitute the administrative policy of the Secretariat and, thus are binding on both management and staff. However, these periodic instructions are hierarchically inferior to the Staff Rules, the General Standards, and the Charter, and as such, may not conflict with those superior sources of internal law.⁶⁶

Each international organization has its own comparable internal statutory law. The text of the "Scope and Purpose" of the UN's Staff Regulations indicates the importance of organizations' Staff Rules:

The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat. The Secretary General, as the Chief Administrative Officer, shall provide and enforce such staff rules consistent with these principles as he considers necessary.⁶⁷

This statement also describes the relationship between the General Standards and Staff Rules of the OAS. The staff rules of both the UN and OAS Secretariats are amendable by their respective Secre-

66. The circulars, memoranda, and orders emanate from different authorities within the Secretariat. The Personnel Circulars are issued by the Director of Personnel, and the Management Circulars are issued by the Assistant Secretary for Management. Each of these two parties derives his authority from, and acts in the name of the Secretary General. The Secretary General issues the Executive Orders and Administrative Memoranda.

These various employer-employee communications do not all necessarily relate to personnel policy; they may also deal with a departmental reorganization, or with any other administrative matter.

67. United Nations Staff Regulations and Staff Rules, ST/SGB/Staff Rules/1/Rev.3, at 1 [hereinafter cited as UN Staff Rules].

taries General as long as the amendments are consistent with the Staff Regulations (UN) and the General Standards (OAS).⁶⁸

3. Exceptions

The respective Secretaries General may make exceptions to the Staff Rules, "provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary General, not prejudicial to the interests of any other staff member or groups of staff members."⁶⁹ The General Standards/Staff Regulations and Staff Rules of these two organizations are more than legal instruments. They are also declarations of moral ideals and standards.⁷⁰ The Regulations, General Standards, and Staff Rules give detailed explanations of the procedures to be followed by employers and employees in implementing these instruments.

4. Other "Rules"

Each organization also has its own additional written sources of law which affect the rights and duties of international career servants. For example, the OAS has the Budgetary and Financial Rules of the General Secretariat.⁷¹ While its essential purpose is to fix a standard for financial and budgetary practices, investments, auditing practices and the like, it also defines the fiduciary responsibility of certain Secretariat officers.

68. *Id.* at 112.2(a); OAS Staff Rules, *supra* note 11, at 113.4.

69. Exec. Order 75-9 amending OAS Staff Rules, *supra* note 11, at 113; UN Staff Rules, *supra* note 67, at 112.4(b).

70. An example of the moral ideals incorporated into these various rules is seen in UN Staff Regulation 1.1:

Members of the Secretariat are international civil servants. Their responsibilities are not national but exclusively international. By accepting appointments, they pledge themselves to discharge their functions and to regulate their conduct with the interests of the United Nations only in view.

Supra note 67, at 1.1. Similar language can be found in the OAS General Standards, and in the Staff Rules of the two secretaries. OAS General Standards, *supra* note 9, at Article 18; UN Staff Rules, *supra* note 67, at 101.6(e); OAS Staff Rules, *supra* note 11 at 101.7.

71. Budgetary and Financial Rules of the General Secretariat, OEA/SER.P, AG/INF 62/76 (Original: English). This instrument was prepared by the Secretariat in accordance with Article 95 of the General Standards, presented to the General Assembly for its acknowledgment, and finally issued by way of Executive Order.

5. General Assembly and Permanent Council Resolutions

The General Assembly's resolutions, as well as those of the Permanent Council, are also a part of the internal law of the Organization.

At times, the resolutions of the General Assembly and the Permanent Council result in novel cases before the Administrative Tribunal, impacting on the international career servants of the General Secretariat. Often, two organs square off against each other in such cases. Thus, in the pending case of *Ryan v. Retirement and Pension Committee of the OAS*,⁷² a staff member has sued to obtain the minimum pension based on the UN formula, which the General Assembly and Permanent Council effectively assured by adopting resolutions establishing parity of remuneration, cost of living, and fringe benefits with the General Secretariat of the United Nations.

Practical difficulty has arisen, however, because the political-legislative organs have not approved budget allocations sufficient to put all of the components of parity into effect. Consequently, the Secretariat and the Retirement and Pension Committee have found themselves in the anomalous position of having to implement a general standard, now part of the internal law of the OAS, without the necessary funds to execute the standard.

Since the OAS Tribunal's Statute does not contemplate suits against either the General Assembly or the Permanent Council, but only against the Secretary General or the Retirement and Pension Committee, an unusual legal situation occurs. The Retirement Committee can be sued to enforce a rule created by the political-legislative organs which have failed to approve the implementing legislation essential for its execution. Should the Tribunal hold in favor of the plaintiff, the staff member will have accomplished indirectly what she could not have achieved directly, that is, obtaining a judicial order obliging the member governments to assure that she and participants in the Fund receive the minimum pensions based on the principle of parity with the UN Retirement Plan, regardless of the Fund's ability to provide such pensions on an actuarially sound basis. Thus, by extension, the member governments are obliged to make contributions sufficient to assure compliance with the Tribunal's judgment.

72. Case No. 57.

It does not take much imagination to see the potential crisis that could be precipitated by such a ruling, given the considerable amounts of money involved. Thus, the *Effects of Awards*⁷³ opinion continues to serve, potentially, in this and other cases as an important precedent in modern international organization administrative law.

6. Retirement and Pension Plans

The principle sources of written internal law of international organizations are contained in the organizations' retirement and pension plans. The plans prescribe the membership of the committee of trustees, their duties, and the rights and obligations of both the employer and the participants in the different funds.⁷⁴

C. Contracts

While the case law of the different administrative tribunals constantly refers to "contracts", "employment contracts", and "contractual rights", the UN family of international organizations and the OAS General Secretariat rarely use the word "contract" in the common bilateral sense in the organizations' internal law.

The term "appointment" commonly describes how one eventually becomes an international career servant. The offer of appointment (to the OAS) details such particulars as duty station, type and duration of appointment, title of post, grade, salary, fringe benefits, and starting date.

The potential career servant must pass a medical exam, adhere to Staff Rules, and sign both a statement by which he accepts OAS terms and conditions, and a Loyalty Oath containing the ideals of the Secretariat's internal labor laws.

A newly-hired international career officer serves a probationary period during which both the quality of his work, and his gen-

73. *Supra* note 48.

74. Retirement and Pension Plan for the Members of the Staff of the Pan American Union, April 2, 1959. In the case of the OAS Retirement and Pension Plan, there is a manual called *The Policies and Procedures of the Retirement and Pension Plan* which expands upon the provisions of the Plan itself. *POLICIES AND PROCEDURES OF THE PAN AMERICAN UNION RETIREMENT AND PENSION PLAN*, August 1960.

The incorporation by reference of the Staff Rules into the employment contract has been the subject of considerable litigation in the area of acquired rights. This is a result of the unilateral amendment of the Staff Rules without the staff members' consent. Such consent may alter a fundamental condition of employment.

eral suitability to the international career service is judged. Successful completion of the probationary period automatically entitles the international career servant to the full spectrum of rights enjoyed by members of the career service.

There are three types of OAS appointments: permanent, fixed term and temporary. Permanent appointees accomplish the Secretariat's permanent functions. A fixed term appointee serves from one to five years and theoretically, carries out long-term, non-permanent functions. Finally, temporary employees whose contracts range from a month to less than a year, perform short-term duties.⁷⁵

The Office of Personnel's Classification and Salary Administration Unit assigns the international servant a salary grade and increments based on the servant's duties. The Staff Rules prescribe periodic desk audits by this Unit as well. The audits assure uniformity of grade assignments as set forth in the Provisional Job Classification Standards, and verify the post description in light of duties actually performed.

1. International and Municipal Law and General Principles

M. B. Akehurst, in *The Law Governing Employment in International Organizations*, states that "if the case law of international administrative tribunals is any guide, the relevance of traditional international law in this field is startlingly limited."⁷⁶ Akehurst further contends that

municipal law is not, strictly speaking a source of law governing employment in international organizations in the same way that Staff Regulations, for instance, are a source of law. It is a separate legal system. . . . It is not even permissible to fall back on municipal law in the event of *lacunae* in the Staff Regulations and Rules; gaps must be filled by reference to general principles of law and not by any resort to a particular municipal system.⁷⁷

Although international administrative tribunals are not obliged to follow international and municipal law, they do have relevance to the law of international organizations. For example, if a staff member participates in his country's social security system and a provi-

75. These distinctions exist in most international organizations. The OAS Tribunal continues to debate the definition of a "permanent" function.

76. AKEHURST, *supra* note 17, at 98.

77. *Id.* at 102.

sion regarding that participation is written into the internal law of the international organization, then the particulars of the municipal legal system in question are incorporated into the organization's internal law. Nevertheless, the OAS Administrative Tribunal has rejected the arguments of parties that have urged that the constitutional guarantees provided in their respective municipal systems should apply to them.

In *Hebblethwaite v. Secretary General of the OAS*, the Court held that:

The complaints' statement that the rights and guarantees afforded them by the Constitution of the United States are and must be relevant and binding in cases before this Tribunal, and that such constitutional protection is in fact one of their rights, must be held invalid in light of Article II of the Tribunal which states that the Tribunal: ". . . shall be competent to hear those cases in which members of the staff of the General Secretariat of the Organization of American States allege non-observance of the conditions established in their respective appointments or contracts, or violation of other applicable provisions, including those concerning the Retirement and Pension Plan of the General Secretariat."

Hence, the Tribunal is not competent to hear alleged violations of the laws of the member states.⁷⁸

Although the international organizations' administrative tribunals are not bound to interpret and apply international and municipal law, a party litigant may argue international or municipal law by analogy. In *Hebblethwaite*, counsel for the Secretary General cited a Mexican case in which the Veracruz State Legislature enacted a law, mandating that by a fixed date, the state civil service had to employ a fixed percentage of Mexican nationals.⁷⁹ In order to implement this decision, the jobs of several foreign nationals who were employed by the Veracruz State Government, were terminated contrary to rights embodied in their employment contracts. The Mexican court held that, notwithstanding the State's unilateral and retroactive deprivation of these workers' contractual

78. *Hebblethwaite v. Secretary General*, OEA/SER.R. TRIBAD/95 (Judgment No. 30, June 1, 1977) (Original: Spanish). The tribunals apply general principles of contract and treaty law, such as *pacta sunt servanda*. The concept of *force-majeure* has also been litigated before the OAS Tribunal. *Hernandez de Aguerro v. Secretary General*, OEA/SER.R. TRIBAD/76 (Judgment No. 24, Nov. 16, 1976) (Original: Spanish).

79. *Sala del Trabajo de la Suprema Corte de Justicia de Mexico*, cited by M. DE LA CUEVA, I DERECHO MEXICANO DEL TRABAJO 406.

rights, the Legislature possessed a superior right to enact laws for the common good of the State and its citizenry. The court concluded that the rights violated were merely "expectations".

Although the Administrative Tribunal rejected this case on the grounds that international career servants, in contrast to national public servants, required a greater degree of protection, the Tribunal did recognize that such a national precedent was relevant, at least by analogy.

Thus, it seems fair to conclude that although international administrative tribunals need not apply international and municipal law, courts will nevertheless avail themselves of the wisdom of different legal systems, and adopt the principles that they consider to be appropriate and useful.

2. Legal Opinions of General Counsel

Legal departments of various international organizations play a multi-faceted role in interpreting and applying the organizations' internal law. Typically, the Secretariat for Legal Affairs of the General Secretariat (Legal Secretariat) of the OAS is called upon to render opinions involving staff members' rights and duties.

Although Legal Secretariat's opinions are theoretically advisory since the Administration is not bound to accept the analyses and recommendations rendered, the fact is that the Administration often follows the opinions. Therefore, the Legal Secretariat's opinions are treated like law and may even have precedential or binding effect. For instance, before the *Ryan* case was even brought up for the preliminary grievance procedures known as *Audiencia* and *Reconsideration*, the Legal Secretariat already had recognized the merit of the plaintiff's claim.⁸⁰

Due to the role of the Legal Secretariat as an interpreter of the written rules which govern personnel matters within the Secretariat, it routinely participates in the development of internal law and practice. Therefore, the Secretariat's opinions are a minor source of law within the General Secretariat.

The quasi-judicial function of the general counsel of an inter-

80. Opinion of the Department of Legal Affairs of the OAS, Nov. 16, 1977. The Department is now a Secretariat.

Later the Legal Secretariat, as counsel for the Retirement and Pension Committee in cases before the OAS Tribunal, was in the anomalous position of having to defend a matter in which its advice had been rejected.

national organization is merely one of its roles. At times, the Legal Secretariat must give an opinion on behalf of either the Retirement and Pension Committee or the Secretary General, in cases in which the two groups' interests may be contrary. Furthermore, in the Legal Secretariat's role as an advocate, it helps forge new case law as articulated by the Tribunal.

5. The Jurisprudence of Other International Administrative Tribunals

In general, international organizations' administrative tribunals freely use holdings established by their peers from other international organizations. Although these decisions are not legally binding, the OAS Tribunal nonetheless views judgments of its sister tribunals as important and respected sources of law.

In *Chretien v. Secretary General*⁸¹ as well as *Hebblethwaite*, the OAS Tribunal adopted the ILO Tribunal's concept of acquired rights and the incidental protection of those rights. Although the OAS cases were not exactly on point factually with the ILO Tribunal case *In re Lindsey*, the issues presented in the two cases were identical.⁸² The OAS Tribunal stated:

On the basis of the principle set by the Tribunal of the International Labour Organization, which is one of the most important sources of legal doctrine on the question of the labor relations of the staff of international organizations, . . . it must be held that the administrative decision to terminate the complainants' employment injured them by violating the principle of non-retroactivity. . . .⁸³

Finally, the Tribunal is bound by its jurisprudence and to date has been consistent in its interpretations. Nevertheless, this requirement of consistency is not absolute, and because the Tribunal is a court of last resort, it is reasonable to assume that at some time it may reverse itself.

D. *Origins of the Administrative Tribunal of the OAS*

Prior to the creation of the OAS Tribunal, the grievance pro-

81. *Chretien v. Secretary General*, OEA/SER.R. TRIBAD/93 (Judgment No. 29, June 1, 1977) (Original: Spanish).

82. *In re Lindsey*, (Judgment No. 61, Sept. 4, 1962) (Original: French).

83. *Hebblethwaite*, *supra* note 78, at 21.

cedure provided for a staff member's direct appeal to, and a personal interview with the Secretary General if the member alleged that the Secretariat had failed to observe the Staff Rules of the PAU. In addition, the staff member also had a right to appeal first to a Grievance Committee and subsequently to an Advisory Committee on Reconsideration. These committees which consisted of Staff and Administration representatives, both had merely advisory functions.⁸⁴

A report submitted by John P. Hoover of the Special Assignments Unit of the Pan American Union (PAU) in June of 1969, pointed out that "[a]s the Staff has grown in size, the established appeals procedure which rests exclusively on the benevolence of the executive authority, has tended to break down and become inoperative".⁸⁵ Hoover further noted that then current procedures "offer[ed] to the staff either a marginal and haphazard protection, or none at all."⁸⁶ Mr. Hoover also expressed the need for staff members to have the right to appeal to an external judicial body. He stated:

It is by now generally accepted that the Staff of an international organization must be insulated against influences and pressures which may be exerted by one or more individual states and protected against the exercise of arbitrary administrative power by the top executive authority of the organization.⁸⁷

He added:

It is generally held that only if these safeguards are effective will the international staff feel sufficiently secure to be able to render the kind and quality of service which the member governments expect and in which they can have confidence. A more pragmatic basis (sic) is that an international organization needs the best staff it can get and, in order to get it, must be able to offer prospective employees some assurance of security comparable to that enjoyed by national civil servants and employees of

84. Pan American Staff Regulations, OEA/SER.D/1/1 (English Rev.) (Original: Spanish at 56-61); Pan American Union Staff Rules, put into force Exec. Order 69-8, 1969, at 10.

85. J. Hoover, Memorandum on Recommendations Regarding PAU Appeals Procedure 2 (Oct. 9, 1969, Dept. of Legal Affairs Archives).

86. *Id.*

87. *Id.* at 3. A group of experts in Public Administration and Finance that had studied the procedures referred to by Hoover, characterized them as "cumbersome," advising simplification. Report of Groups of Experts in Public Administration and Finance, OEA/SER.G./V., c-d-1614 (English) (Original: Spanish/English, at 51).

other international organizations, etc.⁸⁸

In 1968, Elba Kybal, Chairman of the PAU Staff Committee, proposed the creation of an administrative tribunal to Galo Plaza, who was Secretary General at that time. Mrs. Kybal alternatively proposed that the PAU adhere to the Statute of an already-existing tribunal such as the UN or the ILO.⁸⁹ However, article 14 of the UN Tribunal Statute precluded such adhesion by international organizations that did not belong to the UN family.⁹⁰

The initial study conducted on the subject on behalf of Secretary General Plaza, by the Special Assistant to the Under Secretary for Economic and Social Affairs, Georges D. Landau, strongly supported the creation of a new OAS administrative tribunal.⁹¹ With the encouragement of both the Secretary General and the Staff Committee, work began on the preparation of a proposal for consideration by the General Assembly. This work was especially timely because, as Mr. Landau pointed out, new staff rules were being prepared, the Group of Experts' report had favored the creation of such a mechanism, and both the Chairman and Secretary of the Council were former judges on the UN Administrative Tribunal.⁹²

As a starting point, Mr. Landau suggested Wilfred Jenk's definition of "international administrative tribunals" as organs established by the decision-making bodies of international organizations for the purpose of granting redress "for specific grievances arising from the violation of legal rights or equitable expectations which are in the nature of legal rights."⁹³ Actual responsibility for preparing the proposal and draft statute for consideration by the General Assembly and Permanent Council respectively was entrusted to the Department of Legal Affairs of the General Secretariat.

Leon K. Smith, Senior Legal Officer of the Department, collaborated with F.V. García-Amador, the Department Director, in conducting the initial comparative studies of the statutes of the other international tribunals. Mr. Smith noted that "the tribunal's

88. Hoover, *supra* note 85, at 3.

89. See handwritten memorandum from George D. Landau to Francisco García-Amador of Nov. 12, 1968 (Archives of Secretariat for Legal Affairs).

90. Statute of U.N. Administrative Tribunal, *supra* note 34, at art. 14.

91. G. Landau, Preliminary Report on the Establishment of an Administrative Tribunal of the OAS (Nov. 1968, Archives of Secretariat for Legal Affairs).

92. *Id.* at 7.

93. C.W. JENKS, *THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS* 115, 116 (1962).

effectiveness should be determined primarily by the wrongs that were not done and the disputes that were not allowed to fester simply because the Court existed, and only secondarily by its judicial statistics."⁹⁴

In conjunction with this effort, a Working Group of the General Committee of the Permanent Council received the task of adapting the Provisional General Standards of the Secretariat to the new structure of the OAS. This new structure was the result of the Protocol of Buenos Aires then about to enter into force, which would amend the Charter of the Organization.⁹⁵ The Working Group was chaired by Ambassador Alejandro Magnet of Chile.⁹⁶ Upon the Chilean delegation's withdrawal from the Working Group, Panamanian Ambassador Nander A. Pitty Velasquez was elected to carry on Ambassador Magnet's duties as Chairman.

In 1971, the Permanent Council's Committee on Legal and Political Affairs named a second Working Group to consider the General Secretariat's draft Statute of the Administrative Tribunal.⁹⁷ Ambassadors Raul A. Quijano of Argentina, and Carlos Casap of Bolivia, were named Chairman and Vice-Chairman, respectively.⁹⁸ Using the draft Statute prepared by the Department of Legal Affairs, and the Statutes of the Tribunals of both the UN and the ILO as models, the Second Group prepared a new draft Statute.⁹⁹

The Permanent Council's action through this Working Group complied with Resolution 35 of the General Assembly, passed on April 22, 1971. It provided for the creation of the Administrative Tribunal. Thus, the legal birth of this judicial body actually preceded its Statute, Rules of Procedure, and physical constitution.¹⁰⁰

In order to bring the General Assembly's other basic regula-

94. L. Smith, Handwritten Note in Comparative Studies of International Tribunals (Nov. 1971) (Archives of Secretariat for Legal Affairs).

95. Protocol of Buenos Aires, *supra* note 3.

96. The Working Group was made up of representatives of Argentina, Chile, Ecuador, Panama, Peru, the United States, and Uruguay.

97. This Group consisted of representatives of Argentina, Bolivia, Brazil, Colombia, Costa Rica, El Salvador, Honduras, Peru, Trinidad and Tobago, the United States, Uruguay, and Venezuela.

98. *Informe del Grupo de Trabajo de la Comisión de Asuntos Jurídicos y Políticos sobre el Proyecto de Estatuto del Tribunal Administrativo de la OEA*, OEA/SER.G., CP/CAJP - 171, Rev. 1 (June 14, 1971) (Original: Spanish).

99. The Working Group acceded to the Staff Committee's request to present its observations on the proposed draft.

100. In conformity with Resolution 35 of the General Assembly, the Permanent Council formally adopted the statute of the Administrative Tribunal of the OAS on July 16, 1971.

tions in line with those of the newly-created Tribunal, the Assembly established the General Standards, including Article 60 which states:

When the procedures set forth in these Standards (regarding the *Audiencia* and *Reconsideration*) and in the other provisions in force in the General Secretariat (viz. the Staff Rules) have been exhausted, an interested party who considers himself injured shall have the right to resort to the Administrative Tribunal of the Organization, in accordance with the Statutes (sic) of that Tribunal.¹⁰¹ (Parenthetical remarks are the author's.)

In further compliance with Resolution 35, the Permanent Council selected six judges for the Tribunal. Their initial terms were established by lot and future elections were to be conducted annually. This method would assure both membership rotation and continuity. Consequently, although a judge is normally chosen for a single six-year term, the original members served terms that varied from one to six years. The judges, each from a different nation, were nominated by their respective governments. However, the judges were elected in their personal capacities, thus assuring the independence of each member.¹⁰²

At the installation of the members of the new Tribunal, the Chairman of the Permanent Council, Ambassador Luis Herrera of Guatemala, stated that the work of the Tribunal is a

101. General Standards, *supra* note 9, art. 60. Subsequently the Secretary General established Staff Rule 112.5(k). It allows a party that has not received a final decision within thirty days after the *Reconsideration* Committee has forwarded its report to the Secretary General to appeal to the Organization's Administrative Tribunal.

102. The president and vice-president are chosen based on their seniority and hold their offices for a period of one year. Rules of Procedure of the OAS Administrative Tribunal approved October 24, 1975 during the Eighth Regular Meeting of the Tribunal, at Article 2. The first judges were Licenciado Juan Bautista Clement Beltran of Mexico, Professor Mozart Victor Russamano of Brazil, Dr. Carlos Giambrano of Uruguay, Dr. Carlos Alberto Pignetti of Argentina, Dr. John Luis Antonio Passalacqua of the United States, and Licenciado Ronaldo Porta España of Guatemala. At the installation of the members of the new Tribunal, Secretary General Plaza, paraphrased Leon Smith's words:

It should be observed that the success of the Tribunal shall not be measured by the number of cases it is called upon to resolve. It is hoped that the existence of the Tribunal shall stimulate administrative action in the solution of personnel problems in a manner whereby the interested parties needn't recur to the Tribunal in many cases. Thus by its very presence the Tribunal shall strengthen the career service of the international civil servant.

Informe del Consejo Permanente a la Asamblea General sobre el Cumplimiento de la Resolución AG/RES. (i-0/71) "Tribunal Administrativo", OEA/SER.G, CP/DOC. 166/72 Rev. 1, Anexo III (February 28, 1972) at 93 (Original: Spanish).

mission which we understand shall be hard, difficult and complex. But we are sure — given the background of the judges of this Administrative Tribunal, whom we in Permanent Council have responsibly designated, given their status as American university professors, teachers of international labor law — we are confident that they will . . . ably carry out the task we've assigned to them. . . .¹⁰³

E. *The Jurisprudence of the OAS Tribunal*

The OAS Tribunal had rendered a total of fifty-nine judgments as of its Spring 1981 session. The Secretary General has been the defendant in fifty of these suits. The Retirement and Pension Committee has been sued before the Tribunal twelve times, often concurrently with the Secretary General. In addition, the Director General of the Inter-American Institute for Agricultural Sciences (IICA) twice has been a defendant.¹⁰⁴

The chart which follows contains a detailed breakdown of the cases which thus far have been decided by the OAS Tribunal. The Secretary General has won twenty-three and lost twenty-five. The Retirement and Pension Committee has won four cases and lost seven. The results in many of the cases have been mixed. These partial victories are often of great importance because they clarify, and frequently strengthen certain administrative powers of the particular defendant.

At times, the Tribunal has decided against one or more of the plaintiffs in a suit involving multiple complainants. For instance, in *Garcia et al. v. the Secretary General*, only one of the five plaintiffs prevailed even though all complainants raised the same issues.¹⁰⁵ Four of the claims were dismissed because the Tribunal viewed the factual circumstances differently. Other results were so mixed that a student of the Tribunal could not discern which party was the victor and which the loser. The two actions brought against the Director General of IICA illustrate this confusion. Although the complainants won on minor issues, the Tribunal rejected their principal claims.¹⁰⁶

103. *Id.*, Anexo IV.

104. At the time of this writing, thirteen cases are pending before the Administrative Tribunal of the OAS.

105. *Garcia v. Secretary General*, OEA/SER.R., TRIBAD/19 (Judgment No. 6, May 29, 1974) (Original: Spanish).

106. *Frias Moran v. Director General of IICA*, OEA/SER.R., TRIBAD/102 (Judgment

The value of the Tribunal's work cannot be gauged in simplistic terms of who prevailed in the various cases. The importance of the Tribunal's work can be properly discerned only in a study of its jurisprudence. Nevertheless, a list of the parties and the outcome of the various cases indicates the court's behavior, and may be useful.

The Chart on the following pages also indicates the types of remedies applied and the attorneys' fees ordered by the Tribunal. The money damages awarded, often in terms of months of salary or accumulated fringe benefits, have been substantial.

The Tribunal frequently has proposed remedies in the alternative, giving the defendant the option of either reinstating a terminated staff member or indemnifying him at a fixed amount. Thus, the financial significance of the Tribunal's judgments is an important factor for all of the parties.¹⁰⁷

F. *Recommendations*

Notwithstanding the indisputable accomplishments of the Tribunal, there are a number of matters which still must be addressed by the court, the administrators of the Secretariat, and the OAS member governments. What follows is a series of recommendations regarding steps that might be taken by the different participants to improve the functioning of the Tribunal.

1. The Tribunal

- a. Rules of Procedure regarding testimony, and examination of plaintiff and defendant should be improved by the Tribunal.

The Tribunal currently permits a staff member either to represent himself *pro se*, or to designate a legal representative who need not be a lawyer.¹⁰⁸

No. 31, Nov. 11, 1977) (Original: Spanish); *Ogle v. Director General of IICA*, OEA/SER.R., TRIBAD/106 (Judgment No. 34, Apr. 28, 1978) (Original: Spanish).

107. To complete the overview, it should be noted that in three of the fifty-nine cases, third party intervenors have interposed themselves in accordance with Chapter IV, Article 24 of the Rules of Procedure. In each instance, however, their claims were rejected by the court. *Holzman v. the Secretary General*, OEA/SER. R., TRIBAD/65 (Judgment No. 20, May 28, 1978) (Original: Spanish); *Bauta v. the Secretary General*, OEA/SER. R., TRIBAD/77 (Judgment No. 25, Nov. 16, 1977) (Original: Spanish).

108. Rules of Procedure of the OAS Administrative Tribunal, ch. III, art. 22. Approved Oct. 24, 1975 at the Eighth Regular Meeting of the Tribunal.

PLAINTIFFS	DEFENDANTS S.G.* R.C.** ICA***	WINNER	LOSER	INDEMNITY	LEGAL FEES	ALTERNATIVE INDEMNITY
1) Almada	x	S.G.	Plaintiff			
2) Barrett	x	Plaintiff	S.G., R.C.	9 mos. basic salary	\$1,000	or reemployment
3) Krebs	x	Plaintiff	S.G.	\$15,000		
4) Bauta	x	R.C.	Plaintiff			
5) Garcia, Mendez, Zambrana, Mendoza, Lucero†	x	Mendez S.G.	S.G. Garcia Zam- brana Lucero			reclassification to higher grade
6) Polleri	x	S.G.	Plaintiff			
7) Victory	x	Plaintiff	S.G.	12 mos. basic salary plus \$1,149.77 back pay	\$700	
8) Uehling	x	Plaintiff	S.G.	4 mos. basic salary	\$450	
9) Mendoza	x	S.G.	Plaintiff			
10) Vivo	x	Plaintiff	R.C., S.G.	12 mos. basic salary	\$1,100	
11) Aquino	x	Plaintiff	S.G., R.C.	12 mos. basic salary	\$700	
12) Vespremy	x	Plaintiff	R.C., S.G.	12 mos. basic salary	\$800	
13) Alaniz, Arias, Cuenca, Millan, Lopez	x	Plaintiffs	S.G.	Differences between actual payment and perity nullified and substi- tuted an appointment	\$1,000	
14) Caserta	x	Plaintiff	S.G.			
15) Adib	x	S.G.	Plaintiff	difference between		
16) Aquino	x	Plaintiff	S.G.	\$10,581 and proper pay- ment plus 8% interest	\$200	

PLAINTIFFS	DEFENDANTS S.G.* R.C.** ICA***	WINNER	LOSER	INDEMNITY	LEGAL FEES	ALTERNATIVE INDEMNITY
17) Martinez, Comolli	x	Plaintiff	S.G.	revoke restitution and difference between pay- ment and proper payment	\$600	
18) Cisneros	x	S.G.	Plaintiff	\$16,000		or reinstatement with back pay
19) Holzman	x					
20) Holzman	x	S.G.	Plaintiff			
21) Mendez	x	S.G.	Plaintiff			
22) Ramirez	x	R.C.	Plaintiff			
23) Aquino†	x	Plaintiff	S.G.	\$1,136.35 at 8%	\$200	
24) Hernandez	x	Plaintiff	S.G.	\$22,000	\$1,300	or reinstatement with back pay
25) Bauta	x	S.G.	Plaintiff			
26) Getz	x	Plaintiff	S.G.	\$23,000	\$1,300	or reinstatement with back pay
27) Planells	x	Plaintiff	S.G.	\$23,000	\$1,300	or reinstatement with back pay
28) Mendez	x	Plaintiff	S.G.	\$20,000	\$1,200	or reinstatement with back pay
29) Chretien	x	Plaintiff	S.G.	\$12,000	\$1,000	or reinstatement with back pay
30) Hebblethwaite et al.	x	Plaintiffs	S.G.	\$59,000 total	\$1,500 total	or reinstatement with back pay
31) Frias Moran†	x	Plaintiff	IICA	\$800		
32) Conley, Zambrana	x	S.G.	Plaintiffs			
33) Vera†	x	Plaintiff	S.G.		\$750	transfer to a higher grade travel costs
34) Ogle†	x	Plaintiff	IICA			

PLAINTIFFS	DEFENDANTS	WINNER	LOSER	INDEMNITY	LEGAL FEES	ALTERNATIVE INDEMNITY
	S.G.* R.C.** ICA***					
35) Ryan, Boita, Shepherd	x	Plaintiffs	R.C.	UN Minimum Pension	\$3,000	
36) Boita	x	Plaintiffs	S.G.	Ordered new job description and desk audit	\$1,250	
37) Buchholz, Perazzo, Poole	x	Plaintiffs	S.G.	Ordered payment of salary differential to staff	\$3,000	
38) Cortina	x	S.G.	Plaintiff		\$1,500	
39) Brocos	x	Plaintiff	S.G.	Ordered reclassification of post.	\$1,200	
40) Eakenasay	x	Plaintiff	S.G.	Rehire plaintiff	\$1,800	Fixed payment
41) McAdams	x	S.G.	Plaintiff			
42) Martinez	x	Plaintiff	R.C.	Revoked order of Pension Committee		
43) Thevenet	x	S.G.	Plaintiff			
44) Rodriguez	x	Plaintiff	S.G.	Revoked appointment of intervenor & ordered new selection process		
45) Bauta	x	S.G.	Plaintiff			
46) Galvan	x	S.G.	Plaintiff			
47) Saravia	x	Plaintiff	S.G.	Ordered reclassification of post	\$1,500	
48) Bauta	x	S.G.	Plaintiff			
49) Graneros	x	S.G.	Plaintiff			
50) Mendez	x	S.G.	Plaintiff			
51) Hernandez de Aguiro	x	S.G.	Plaintiff			
52) Hernandez de Aguiro	x	S.G.	Plaintiff			

PLAINTIFFS	DEFENDANTS S.G.* R.C.** IICA***	WINNER	LOSER	INDEMNITY	LEGAL FEES	ALTERNATIVE INDEMNITY
53) Cuenca	x	Plaintiff	S.G.	Ordered reinstatement and back pay	\$1,500	3 years salary
54) Martinez	x	S.G.	Plaintiff			
55) Mendez	x	Plaintiff	S.G.	Ordered reinstatement and back pay	\$1,500	\$24,000
56) Garcia	x	S.G.	Plaintiff			
57) Zuntz	x	R.C. & S.G.	Plaintiff			
58) Carvalho	x	Plaintiff	R.C.	Ordered retroactive entry into fund.	\$1,200	
59) Reeve	x	Plaintiff	S.G.	Ordered special duty allowance for part of period requested.		

† Split decision *Secretary General **Retirement Committee ***Inter-American Agricultural Institute

In both situations, the Tribunal does not allow the plaintiff to testify, or to be subjected to either direct or cross-examination. This practice is irregular and violates the rights of both the plaintiff and the defendant. In the former case, it prevents the staff member from stating, in his own words, the bases of his complaint. Even in instances in which the plaintiff testifies *de facto* in the course of his final argument, neither the court nor the defense has an opportunity to question him. This violates the right of the accused to confront his accuser.¹⁰⁹

The Tribunal has held that the Secretary General may not be ordered to appear in person before the Tribunal.¹¹⁰ All other staff members, however, are subject to the Tribunal's order to appear and testify as witnesses. In fact, in at least one instance, the tribunal ordered the appearance and testimony of the Assistant Secretary General.¹¹¹ Even though the Tribunal believes that the plaintiff should not be cross-examined by the Secretary General's Counsel, the plaintiff at least should be examined carefully by the judges.

- b. Opening statements by the parties should be allowed by the Tribunal.

The Tribunal's Rules of Procedure do not permit opening statements. Thus, the first portion of oral hearings consists of examination of all witnesses except the plaintiff and the Secretary General. The closing statements of the parties' counsel and a brief opportunity for rebuttal follow the witness examinations. The closing statements of counsel or other parties unaccustomed to public speaking and legal debates often become rambling expositions.

A better method of establishing the focal point of the parties' respective arguments would be to permit brief opening statements containing both the allegations and the theories of the case as perceived from the opposing vantage points.¹¹²

109. U.S. CONST. art. VI; *State v. Crooker*, 123 Me. 310, 122 A. 865 (1923).

110. *Bauta v. Secretary General*, OEA/SER. R., TRIBAD/77 (Judgment No. 25, Nov. 16, 1977) (Original: Spanish).

111. *Id.* The Tribunal would be well advised to state its position in less categorical terms, on the appearance of the Secretary General before the Tribunal. It is easy to envision a case in which the ends of justice might be defeated without the Secretary General's testimony.

112. In defense of this recommendation, it should be noted that opening statements are a routine and useful aspect of common law trial procedure, and the parties may use, waive, or reserve such statements.

At common law, the jury either knows nothing of the case at bar at its outset or, at least, has an unbiased view of the merits of the case. The Tribunal members, on the other hand, presumably have read the written pleadings prior to the hearing.

Therefore, although opening statements are not very crucial in the Tribunal's oral proceedings, they may be very helpful both in focusing on and defining the issues, and in presenting the evidence. This is especially important in terms of marshalling proofs and testimony since, occasionally, it has been unclear what a particular party was attempting to accomplish in his examination of witnesses.¹¹³

Permission to make opening statements during the court's oral hearings require amending the Rules of Procedure. The Tribunal itself has the authority to change its own procedures.

- c. Rules of discovery of evidence should be better defined by the Tribunal.

The Secretariat for Legal Affairs recommended the policy implemented by the Office of Human Resources of allowing a staff member to view his own personal file. This includes viewing the "confidential file" which can only be viewed by the staff member in the presence of a custodian from the Office of Human Resources. Nothing may be removed or photocopied. However, the employee may make handwritten notes.

The staff member is somewhat hindered in obtaining from his own files authentic copies of documentary evidence that may be pertinent to his case. However, the staff member can overcome this impediment. He may insist that the Reconsideration Committee and the Tribunal, which both have a general subpoena power over files, take note of the documents that the member deems relevant to his case.

Staff access to files is more difficult for an employee who seeks to learn the contents of another staff member's file. This occurs when an employee vying for a vacant post asserts that he is more qualified than his competitor.

This delicate situation can arise if a staff member's files contain sensitive material relating to his personal life, including the

113. Witnesses should be sequestered during opening statements. This practice is already followed by the Tribunal during the examination of witnesses.

individual's mental or physical health, or family status. Thus, the Secretariat must respect the privacy of its staff members. Although this handicap may also be overcome by the Reconsideration Committee and Tribunal's general subpoena powers, it is doubtful whether the Tribunal is either disposed or equipped to act as an investigator.

The Office of Human Resources should not have the task of censorship for two reasons: first, because it is identified with the Secretariat; and second, because it has neither the expertise nor the personnel to dedicate to the problem.

In the absence of a discovery mechanism, the employee may become frustrated in his efforts to redress his grievances. Furthermore, the lack of this fundamental process may suggest an Administration cover-up.

- d. Rules regarding the submission of evidence should be clarified and improved by the Tribunal.

Generally, evidence presented to the Tribunal is either documentary or oral. The Rules of Procedure require that authentic or "true copies" of written evidence be physically attached to the pleadings filed in each case.¹¹⁴ At times, the exchange of pleadings can be completed up to six months before a case is decided. However, one of the parties often will receive written evidence of which it had been unaware.

Such evidence is admissible by implication. The Rules of Procedure allow for revision when new evidence is produced even after a case has been decided. Thus, it is reasonable to presume that a similar allowance may be made before judgment is rendered.

On several occasions, both the claimants and the Secretary General have sought to introduce documentary evidence just prior to or during oral proceedings.¹¹⁵ However, these requests have been uniformly rejected. These denials are wise in light of the court's failure to determine whether such evidence was reasonably available beforehand.

The new procedure advanced in this article would give the opposing party the opportunity to evaluate the new proof. Although this system may delay the proceedings, it is in the best interests of

114. Rules of Procedure, *supra* note 108, ch. III, art. 9(e).

115. See, e.g., *Hernandez de Aguerro*, *supra* note 78.

justice for a party to be aware of all evidence being introduced against him.

The matter of testimonial evidence also deserves some re-examination by the Tribunal. Testimony is given under oath by both expert and *res gestae* witnesses. Generally, the Tribunal President consistently has sustained objections to hearsay testimony. Nevertheless, the tendency to ask leading questions on direct examination often materially affects the testimony of some witnesses.

2. The General Secretariat

- a. The Secretariat should minimize the use of memoranda, circulars, and orders emitted by its dependencies.

Executive orders, administrative memoranda, and personnel and management circulars made it difficult for the Secretariat for Legal Affairs to keep abreast of the Administration's numerous orders. It would be advisable to channel these written matters through a single officer in order to harmonize them in terms of style and content, and to reduce the confusion that currently exists because of this abundance of paper.

- b. The Secretary General should try to clarify the attorney-client privilege.

Currently, the Secretariat for Legal Affairs frequently must advise the Administration regarding the rights and duties of staff members. The memoranda issued by the Secretariat routinely are placed in staff members' personal files. Thus, when a labor controversy arises, the attorney-client relationship between house counsel and the Administration has already been breached. Discussion must be held with the Director of Human Resources in order to resolve this problem.

Another dimension of this problem occurs in proceedings before the Administrative Tribunal. The Tribunal may violate the attorney-client privilege in the Secretariat by use of its subpoena authority. The Administration, in consultation with the Legal Secretariat, must try to clarify this ancient and important privilege.

- c. The holdings of the Tribunal should be disseminated more widely within the Secretariat.

The Tribunal's rulings that certain administrative practices

are proper or improper, alerts the Secretariat to what is permissible. However, mistakes already addressed by the Tribunal often have been repeated.

To resolve this problem, the Secretariat for Legal Affairs should prepare digests of the cases decided by the Tribunal. These digests then should be circulated to the Secretariat's supervisory personnel.

3. The Member-States

- a. The member states promptly should approve a new Retirement and Pension Plan for the staff.

The current Plan is outdated. It is philosophically out of step with modern social security systems. Few staff members actually receive pensions. Upon retirement, most members opt for a lump sum liquidation of their accounts.

Moreover, the Retirement and Pension Committee's present authority to extend a staff member's period of service when the member has reached mandatory retirement age clearly is an executive function that should belong only to the Secretary General.

Instituting a new Retirement and Pension Plan may be difficult because participants in the current Plan enjoy many rights acquired under it. Nevertheless, it is not impossible to preserve these rights while implementing a modern and fair retirement and pension system.